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No. 91-411

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT "BOSKO" STRUMINIKOVSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit

REPLY BRIEF

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REPLY BRIEF

STATEMENT OF THE CASE

Petitioner Bosko Struminikovski (Bosko) was convicted after an eight-week jury trial on a series of charges including continuing criminal enterprise, use of a firearm in relation to drug trafficking, and attempted bribery (21 U.S.C. § 848, 18 U.S.C. § 924(c), § 201(b)(1)). The continuing criminal enterprise charge alleged drug trafficking in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 845b(f), and § 846.

Trial proceedings produced evidence which variously showed an enterprise bent on the sale of \$25 bags of cocaine out of Chicago area restaurants, with Bosko as the ostensible head of the organization. Beginning in 1984, Bosko and girl-friend Amanda Roland travelled to Florida and arranged for the transport of a quantity of cocaine from Florida to Chicago. (Tr. 670-71) That journey touched off a course of conduct involving regular distributions of cocaine. Distribution spots included the United Grill (Tr. 1239, 1242-53) and La Petite Restaurant. (Tr. 2611-22) While the food service business *per se* was questionable at best, La Petite nevertheless drew traffic jams most weekends caused by eager cocaine-purchasing-patrons. (Tr. 2586-2600)

Infiltration by an undercover D.E.A. agent ultimately put an end to the organization in 1986 and led to Bosko's arrest. (Tr. 3228-36, 3337-38, 3343)

Bosko proceeded to a joint jury trial with retained counsel, yet counsel's adherence to Bosko's not-guilty plea took the form of repeated declarations that Bosko was a dope dealer, systematically piling all the evidence of that dope dealing in front of Bosko while extolling Bosko's guilt. (A sampling of closing argument excerpts made on Bosko's behalf is reproduced in Bosko's opening petition for writ of certiorari at pp. 5-8).

Ultimately, the jury heeded defense counsel's argument and convicted Bosko on all counts. Bosko was sentenced to a total of 23 years in custody along with fines totaling \$140,000. (R. 598)

REASON FOR ALLOWANCE OF THE WRIT

WHETHER THE SPLIT IN CIRCUITS AS TO DEFENSE COUNSEL'S ASSERTION OF HIS CLIENT'S GUILT IN A FEDERAL CRIMINAL TRIAL MANDATES SUPREME COURT REVIEW AND DISPOSITION.

As set out in his Opening Petition for Writ of Certiorari, Bosko argues that the appellate court's decision on this issue not only breaks with Seventh Circuit case law, *see Achtien v. Dowd*, 117 F.2d 989, 993 (7th Cir. 1941), but also fuels a split in circuits on the propriety of defense counsel conceding/stipulating a client's guilt in the face of a not-guilty plea.

The latest pronouncement on the issue of counsel's concessions of guilt hails from the Ninth Circuit in *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991), which reversed defendant's bank robbery conviction. In *Swanson*, defense counsel conceded the lack of any reasonable doubt on the one count of bank robbery for which Swanson was tried. *Id.* at 1071. Counsel further argued that he did not want to insult the intelligence of the jury by trying to raise a reasonable doubt, and that the jury should not hesitate if they believed the right verdict to be guilty. *Id.* at 1077-78.

In its analysis, the *Swanson* court found a deprivation of both Due Process (5th amendment) and effective assistance of counsel (6th amendment) which was prejudicial *per se*. *Id.* at 1073-74. Starting with the basic tenets of *Strickland v. Washington*¹, and the prejudice-exception of

¹ 466 U.S. 668 (1984).

*United States v. Cronic*², the court noted that failure to hold the government to its proof—beyond a reasonable doubt—is inconsistent with Due Process, and constituted “an abandonment of the defense of his client at a critical stage of the criminal proceedings”. *Swanson*, 943 F.2d at 1073-74. Moreover, *Swanson* noted that the government in that case had failed to offer up any strategy to justify defense counsel’s “betrayal of his client”. *Id.* at 1075.

At bar the government attempts to curry credibility for defense counsel’s concessions of Bosko’s guilt by adopting the appellate court’s reasoning that because the evidence on the conceded counts was “overwhelming”, “it would have been ‘foolhardy for [petitioner’s] counsel to deny the drug sales so credibly proven by the government.’ ” (Brief in Opposition, p. 6)³

Close consideration of the severity of the conceded counts shows grim sentencing consequences. Bosko’s counsel con-

² 466 U.S. 648 (1984). *Cronic* allows for a presumption of prejudice where an “actual breakdown” in the adversary process at trial occurs. See *Swanson*, 943 F.2d at 1072 (citing *Toomey v. Bunnell*, 898 F.2d 741, 744 n.2 (9th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 390 (1990)).

³ The government fails to alert the Court to that segment of the opinion below which reiterates that one of Bosko’s joint-trial co-defendants, Debbie Cerveney, pled guilty to certain counts of the indictment *PRIOR TO THE JOINT JURY TRIAL*, 931 F.2d at 1199, n.18—AND MS. CERVENY CONTESTED ONLY HER CONSPIRATORIAL MEMBERSHIP COUNT (COUNT 2) WITHIN THE FABRIC OF THE MULTI-DEFENDANT, MULTI-JURY TRIAL.

The above is clearly a constitutionally-acceptable approach consistent with *Boykin v. Alabama*, 395 U.S. 238 (1969) and *Brookhart v. Janis*, 384 U.S. 238 (1969); such posturing of submitting Bosko’s guilty pleas to selected counts pre-trial was certainly available to defense counsel below.

ceded counts 7, 8, 9, 11, 13, 14, 15, 17, and 18. (See Tr. 5321) Counts 7, 8, 9, 11, 14, and 15 were charged per 21 U.S.C. § 841(a)(1) and carried potential penalties of 15 years per count, or 90 years in custody. Count 13 charged a violation of 18 U.S.C. § 201(b)(1) (attempted bribery of a public official) which carries a permissive 5 year custodial sentence. Counts 17 and 18 charged federal weapon violations; the § 924(c) count (Count 17) compelled a 5 year consecutive sentence while the § 922(g)(1) count (Count 18—felon in possession of a firearm) carries a 10 year custodial sentence. Hence, the cumulative permissive penalties on the conceded counts totaled 105 years in custody. Concession of multiple counts which carry such custodial sentencing potential can hardly add up to “logical trial strategy”. (See Brief in Opposition, p. 4).

Clearly, it is established that this Court has never conditioned the right to counsel on actual innocence—“the constitutional rights of criminal defendants are granted to the innocent and the guilty alike”. See *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986). As applied to Bosko Struminikovski, the question of prejudicially ineffective assistance of counsel is open, per the current split in circuits, and merits review.

CONCLUSION

Because of the fundamental 5th and 6th amendment questions raised, as well as the split in circuits presented in the Petition and in this Reply, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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